Supreme Court, U.S.
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Case No. 85-1811

In the Supreme Court of the United States

October Term, 1985

IN RE: JENNY LYNN MINING COMPANY,
Debtor;

STATE OF OHIO,
DEPARTMENT OF NATURAL RESOURCES,
Petitioner,

v.

GERALD H. SPIERS, TRUSTEE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. QUESTION PRESENTED FOR REVIEW

Whether a claim arising from costs of reclamation in excess of the surety bond posted pursuant to Ohio Revised Code §1513.08[1] is a general unsecured claim entitled to priority status pursuant to 11 U.S.C. §507(a)(6)(E)[2] as an excise tax?

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[1]Ohio law provides that a surety is held to the obligation which attaches to his bond by virtue of the law in force at the time the surety enters into its undertaking. *McGaughey v. Jacoby*, 54 Ohio St. 487, 500, 44 N.E. 231, 234 (1896). Citations will therefore be provided to Ohio statutes in force prior to February 18, 1981, the date of filing of the Chapter 7 petition herein. Although amendments to the cited statutes do not alter the respondent Trustee's arguments, copies are set forth in the appendix of the cited statutes as amended effective after February 18, 1981 but prior to August 7, 1981, the date of filing of Amended Proof of Claim No 15.

[2]The Bankruptcy Amendments and Federal Judgeship Act of 1984 (Pub. L. No. 98-353) amended 11 U.S.C. §507. As a result, the subsection relating to the priority of taxes has been renumbered as 11 U.S.C. §507(a)(7) from 11 U.S.C. §507(a)(6). Although the substance of the text of 11 U.S.C. §507(a)(7)(E) is unchanged from 11 U.S.C. §507(a)(6)(E), reference will be made to the statute as numbered prior to the enactment of the Bankruptcy Amendments and Federal Judgeship Act of 1984.

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REASONS FOR DENYING THE PETITION

The issue before this Court is whether a claim arising from costs of reclamation in excess of the surety bond posted pursuant to Ohio Revised Code §1513.08 is a general unsecured claim entitled to priority status pursuant to 11 U.S.C. §507(a)(6)(E) as an excise tax. In resolving that issue, the Sixth Circuit Court of Appeals properly applied the decisions of this Court and held that the claim of the Ohio Department of Natural Resources[3] for the non-payment of the surety bond is a general unsecured claim. *In re Jenny Lynn Mining Co.*, 780 F.2d 585, 589 (6th Cir. 1986).

A. THE DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS IS CONSISTENT WITH PRECEDENT.

The decision of the Sixth Circuit Court of Appeals, *In re Jenny Lynn Mining Co.*, 780 F.2d 585 (6th Cir. 1986), is consistent with prior decisions of this Court. The Sixth Circuit Court of Appeals followed *New York v. Feiring*, 313 U.S. 283 (1941), but found that the definition of taxes in that case was of limited utility because *Feiring* did not require the Court to make the distinction between governmentally imposed fees and taxes. 780 F.2d at 589. The Sixth Circuit Court of Appeals had previously made that distinction in *United States v. River Coal Co.*, 748 F.2d 1103 (6th Cir. 1984), and therefore turned to it.

In *River Coal*, a case decided under the Bankruptcy Act of 1898, as amended, the Court held that the interest on delinquent abandoned mine reclamation fees was a tax. 748 F.2d at 1106. The Court relied in part on *National Cable Television Assn., Inc. v. United States*, 415 U.S. 336 (1974), a decision of this Court which identified some of the differing characteristics of taxes and fees. 748 F.2d at 1106.

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[3]Hereinafter referred to as ODNR.

The distinction between governmentally imposed fees and taxes is a valid one[4]. In *River Coal*, the Court considered the reclamation fee collected pursuant to 30 U.S.C. §1232. 748 F.2d at 1105. That statutory provision of federal law is equivalent to the mineral severance tax collected pursuant to Ohio Revised Code §5749.02. That state mineral severance tax is specifically called an excise tax. One of its purposes is to provide revenue to reclaim land affected by mining. Ohio Revised Code Ann. §5749.02 (Page 1980). In the event that tax is not paid, it becomes a lien on property of the taxpayer in the state of Ohio. *Id.* This is in contrast to the use mandated by Ohio Revised Code §1513.08 of the cash, surety bond or certificates of deposit to reclaim strip mined lands of a specific operator in the event of that operator's default.

As recently noted by Justice O'Connor, "a State may protect its interests in the enforcement of its environmental laws by giving cleanup judgments the status of statutory liens or secured claims." *Ohio v. Kovacs*, 469 U.S. at ____, 105 S.Ct. 705, 712 (1985) (O'Connor, J., concurring). In *Kovacs*, this Court held that the obligation of an individual debtor to pay money to clean up toxic materials from a site was a dischargeable debt. 469 U.S. at ____, 105 S.Ct. at 711.

This Court noted in *Kovacs* that the only issue before it was the affirmative duty of the debtor to clean up the site and to pay money to that end. 469 U.S. at _____, 105 S.Ct. at 711. The Court also noted that if a fine or monetary penalty for violating state law had been imposed on the debtor prior to the filing of the petition, the obligation might be mondischargeable pursuant to 11 U.S.C. §523(a)(7). *Id.*

[4]The Ninth Circuit Court of Appeals, in holding that sewer user fees did not constitute taxes, followed *New York v. Fiering*, 313 U.S. 283 (1941), and also adopted the distinction drawn between taxes and governmentally imposed fees in *National Cable Television Assn., Inc. v. United States*, 415 U.S. 336 (1974). *In re Lorber Industries of California, Inc.*, 675 F.2d 1062, 1066-68 (9th Cir. 1982).

However, as noted by Bankruptcy Judge Perlman, discharge of the obligation of the debtor to pay the State of Ohio compensation for pecuniary loss occasioned by the necessity to clean up the site would not be barred by 11 U.S.C. §523(a)(7). *In re Kovacs*, 29 Bankr. 816, 818 (Bankr. S.D. Ohio 1982). That bankruptcy court decision was affirmed by the district court. Subsequently, the Sixth Circuit Court of Appeals noted that if the State of Ohio has assessed a money penalty against the debtor for the environmental damage caused, the penalty might have been excepted from discharge pursuant to 11 U.S.C. §523(a)(6) or (7). *In re Kovacs*, 717 F.2d 984, 988 (6th Cir. 1983), *aff'd Ohio v. Kovacs*, 469 U.S. _____, 105 S.Ct. 705 (1985). There was no suggestion that the claim of the State of Ohio was excepted from discharge as a tax within the scope of 11 U.S.C. §523(a)(1)(A).

The interplay of 11 U.S.C. §507(a)(6) and 11 U.S.C. §523(a)(1)(A) definitively demonstrates that the surety bond in issue is not a tax. Pursuant to 11 U.S.C. §523(a)(1)(A), an individual debtor may not be discharged from a tax of a kind specified in 11 U.S.C. §507(a)(6). Therefore, if a debt of an individual debtor does not fall within the exception to discharge set forth in 11 U.S.C. §523(a)(1)(A), that debt is dischargeable and could therefore not be an excise tax pursuant to 11 U.S.C. §507(a)(6)(E). In *Kovacs*, this Court held that the obligation of an individual debtor to pay money to clean up toxic materials from a site was a dischargeable debt. 469 U.S. at _____, 105 S.Ct. at 711. The surety bond in issue is an obligation conceptually identical to the obligation to clean up toxic materials considered by this Court in *Kovacs*. Since this surety bond obligation would be dischargeable as to an individual debtor, it is not an excise tax.

The decision of the Sixth Circuit Court of Appeals from which ODNR seeks a Petition for Writ of Certiorari is consistent with precedent. The Petition for Writ of Certiorari should therefore be denied.

B. THE DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS DOES NOT CONFLICT WITH THE INTERPRETATION OF OTHER CIRCUITS WITH RESPECT TO THE WORD "TAX" FOR BANKRUPTCY PURPOSES.

The decision of the Sixth Circuit Court of Appeals, *In re Jenny Lynn Mining Co.*, 780 F.2d 585 (6th Cir. 1986), does not conflict with the interpretation by other Circuit Courts of Appeal of the word "tax" for bankruptcy purposes. The Sixth Circuit Court of Appeals followed *New York v. Feiring*, 313 U.S. 283, 285 (1941), with regard to the definition of "taxes" for bankruptcy purposes. 780 F.2d at 589. Contrary to ODNR's assertions, *Jenny Lynn* is consistent with *In re Pan American Paper Mills, Inc.*, 618 F.2d 159 (1st Cir. 1980), in which the First Circuit Court of Appeals also followed *Feiring*.[5] *Jenny Lynn* is also consistent with *In re Lorber Industries of California, Inc.*, 675 F.2d 1062 (9th Cir. 1982), a decision of the Ninth Circuit Court of Appeals which adopted *New York v. Feiring, supra*, as well as *National Cable Television Assn., Inc. v. United States*, 415 U.S. 336 (1974), and recognized the distinction between taxes and governmentally imposed fees. That Court held that sewer user fees did not constitute taxes entitled to priority treatment. 675 F.2d at 1066-68.

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[5]The First Circuit Court of Appeals, citing *In re William Akers, Jr., Co.*, 121 F.2d 846 (3d Cir, 1941), compared the premiums assessed under Puerto Rico's Workmen's Accident Compensation Act to a state's claim for unemployment contributions. *In re Pan American Mills, Inc.*, 618 F.2d at 162. The Third Circuit Court of Appeals in *Akers* did not cite *New York v. Feiring*, 313 U.S. 283 (1941), which was decided less than two months prior to the *Akers* case.

In *Jenny Lynn*, 780 F.2d at 588-89, the Sixth Circuit Court of Appeals followed its prior decision, *United States v. River Coal Co.*, 748 F.2d 1003 (6th Cir. 1984), which considered the *Pan American Mills* decision in its reasoning. 748 F.2d at 1106.

The decision of the Sixth Circuit Court of Appeals, *In re Jenny Lynn Mining Co.*, 780 F.2d 585 (6th Cir. 1986), is consistent with prior decisions of this Court and the decisions of other Circuit Courts, and ODNR's Petition for Writ of Certiorari should therefore be denied.

C. THE DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS CONFORMS TO THE POLICY OF FEDERAL BANKRUPTCY LAW.

The decision of the Sixth Circuit Court of Appeals, *In re Jenny Lynn Mining Co.*, 780 F.2d 585 (6th Cir. 1986), conforms to the policy of federal bankruptcy law. The broad purpose of the Bankruptcy Code[6] is to equitably distribute the debtor's estate, and the priority provisions of 11 U.S.C. §507 run counter to that broad purpose because they create a special status for specified claims. *See In re Lorber Industries of California, Inc.*, 675 F.2d 1062, 1065-66 (9th Cir. 1982). Priority status must be justified by a clear statutory authorization. 675 F.2d at 1066. In addition, the trend is to give a "somewhat less expansive interpretation of what are 'taxes' under the priority statutes in bankruptcy," *In re Payne*, 27 Bankr. 809, 817 (Bankr. Kan. 1983). Exceptions to discharge should be liberally construed in favor of the debtor,[7] and ambiguities in the Bankruptcy Code must be resolved in favor of the debtor. 27 Bankr. at 817.

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[6]Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 11 U.S.C. §§101-151326.

[7]Only those taxes which are entitled to priority pursuant to 11 U.S.C. §507(a)(6) would be excepted from discharge pursuant to 11 U.S.C. §523(a)(1)(A). A cleanup order reduced to a monetary obligation is dischargeable under 11 U.S.C. §727 *Ohio v. Kovacs*, 469 U.S. ___, 105 S.Ct. 705, 711 (1985). If an individual debtor were involved, the surety bond in issue would also be dischargeable and the surety bond could therefore not be deemed a priority tax.

The State of Ohio is not precluded from protecting its interest in the enforcement of its environmental law. Justice O'Connor has suggested that states could protect their interests in the enforcement of their environmental laws by giving cleanup judgments the status of statutory liens or secured claims. *Ohio v. Kovacs*, 469 U.S. ____, 105 S.Ct. 705, 712 (1985) (O'Connor, J., concurring).[8]

There is a close relationship between the environmental cleanup obligation presented in *Kovacs* and the obligation to reclaim land presented herein. The public policy considerations are very similar. If anything, the public policy considerations in *Kovacs* are even more compelling than those presented herein because the threat of toxic wastes to the public health, safety and welfare in *Kovacs* is much greater than the alleged threat herein of an open pit. If pre-petition claims for environmental damage are to receive special treatment, Gerald H. Spiers submits that the legislature should codify that special treatment. At the present time, pre-petition claims for environmental damage do not fall within the limited priority classification of 11 U.S.C. §507(a)(6)(E)[9] for excise taxes nor within the other classes of priority claims enumerated in 11 U.S.C. §507.

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[8]*In re Lorber Industries of California, Inc.*, 675 F.2d 1062 (9th Cir. 1982), supports Justice O'Connor's suggestion. The state statutes under which the county sanitation district operated in *Lorber Industries* provided that unpaid sewer user fees would constitute a lien against the user's real property. 675 F.2d at 1068. If the district had perfected its lien, it would have been treated as a secured creditor. *Id.*

[9]Although ODNR asserts that "a claim classified as a tax is accorded priority treatment in the distribution of assets in the bankruptcy proceedings, 11 U.S.C. 507(a)(6)(E)," Petition for Writ of Certiorari at 6-7, neither the legislative history of 11 U.S.C. §507 nor case law support that sweeping conclusion. "The sixth priority is for *certain* taxes." [Emphasis added.] H.R. Rep. No. 95-595, 95th Cong. 2nd Sess. (1978), 5 U.S. Code Cong. & Ad. News 5856, S. Rep. No. 95-989, 95th Cong., 2nd Sess. (1978), 5 U.S. Code Cong. & Ad. News 5856. *See In re Lorber Industries of California, Inc., 675 F.2d 1062, 1065-66 (9th Cir. 1982), discussed in Argument C, supra* at 5.

The bankruptcy estate of Jenny Lynn Mining Company should not be forced to bear the burden of the State of Ohio's failure to enact legislation to protect the interest it seeks to assert in the enforcement of its environmental laws. If the position asserted by ODNR were sustained, all fees would be "taxes" for bankruptcy purposes. *See In re Jenny Lynn Mining Co.*, 780 F.2d 585, 589 (6th Cir. 1986). That position was specifically rejected by the Sixth Circuit Court of Appeals. *Id.* In addition, it is not appropriate that an obligation for a surety bond, which is no different from any obligation due upon default by Jenny Lynn Mining Co., should be accorded priority treatment merely because it is owed to the State of Ohio. Priority treatment in favor of the State would result in inequitable treatment of other creditors of Jenny Lynn Mining Co. as they would effectively become liable for the costs of reclamation merely by having extended credit to a debtor which unknown to them had failed to reclaim strip mined land and subsequently filed for relief under the Bankruptcy Code. The decision of the Sixth Circuit Court of Appeals conforms to the policy underlying federal bankruptcy law. This Court should therefore deny the Petition for Writ of Certiorari.

CONCLUSION

The case at bar was properly decided by the Sixth Circuit Court of Appeals. It is consistent with decisions of this Court and with decisions of other Circuit Courts of Appeal. Creation of a priority classification for a surety bond relating to reclamation would contravene the established policy to equitably distribute the debtor's estate. The Sixth Circuit Court of Appeals correctly applied the law. If the surety bond relating to reclamation is to be accorded priority status in a bankruptcy case, Congress can enact appropriate legislation.

WHEREFORE, Gerald H. Spiers, Trustee for Jenny Lynn Mining Company, respectfully requests that this Court deny the Petition for Writ of Certiorari requested by the State of Ohio, Department of Natural Resources.

Respectfully submitted,

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BANKRUPTCY REFORM ACT OF 1978
11 U.S.C. §507

§507. Priorities.

(a) The following expenses and claims have priority in the following order:

(1) First, administrative expenses allowed under section 503(b) of this title, and any fees and charges assessed against the estate under chapter 123 of title 28.

(2) Second, unsecured claims allowed under section 502(f) of this title.

(3) Third, allowed unsecured claims for wages, salaries, or commissions, including vacation, severance and sick leave pay—

(A) earned by an individual within 90 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first; but only

(B) to the extent of $2,000 for each such individual.

(4) Fourth, allowed unsecured claims for contributions to employee benefit plans—

(A) arising from services rendered within 180 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first; but only

(B) for each such plan, to the extent of—

(i) the number of employees covered by such plan multiplied by $2,000; less

(ii) the aggregate amount paid to such employees under paragraph (3) of this subsection, plus the aggregate amount paid by the estate on behalf of such employees to any other employee benefit plan.

(5) Fifth, allowed unsecured claims of individuals, to the extent of $900 for each such individual, arising from the deposit, before the commencement of the case, of money in connection with the purchase, lease, or rental of property, or the purchase of services, for the personal, family, or household use of such individuals, that were not delivered or provided.

(6) Sixth, allowed unsecured claims of governmental units, to the extent that such claims are for—

(A) a tax on or measured by income or gross receipts—

(i) for a taxable year ending on or before the date of the filing of the petition for which a return, if required, is last due, including extensions, after three years before the date of the filing of the petition;

(ii) assessed within 240 days, plus any time plus 30 days during which an offer in compromise with respect to such tax that was made within 240 days after such assessment was pending, before the date of the filing of the petition; or

(iii) other than a tax of a kind specified in section 523(a)(1)(B) or 523(a)(1)(c) of this title, not assessed before, but assessable, under applicable law or by agreement, after, the commencement of the case;

(B) a property tax assessed before the commencement of the case and last payable without penalty after one year before the date of the filing of the petition;

(C) a tax required to be collected or withheld and for which the debtor is liable in whatever capacity;

(D) an employment tax on a wage, salary, or commission of a kind specified in paragraph (3) of this subsection earned from the debtor before the date of the filing of the petition, whether or not actually paid before such date, for which a return is last due, under applicable

law or under any extension, after three years before the date of the filing of the petition;

(E) an excise tax on—

(i) a transaction occurring before the date of the filing of the petition for which a return, if required, is last due, under applicable law or under any extension, after three years before the date of the filing of the petition; or

(ii) if a return is not required, a transaction occurring during the three years immediately preceding the date of the filing of the petition;

(F) a customs duty arising out of the importation of merchandise—

(i) entered for consumption within one year before the date of the filing of the petition;

(ii) covered by an entry liquidated or reliquidated within one year before the date of the filing of the petition; or

(iii) entered for consumption within four years before the date of the filing of the petition but unliquidated on such date, if the Secretary of the Treasury certifies that failure to liquidate such entry was due to an investigation pending on such date into assessment of antidumping or countervailing duties or fraud, or if information needed for the proper appraisement or classification of such merchandise was not available to the appropriate customs officer before such date; or

(G) a penalty related to a claim of a kind specified in this paragraph and in compensation for actual pecuniary loss.

(b) If the trustee, under section 362, 363, or 364 of this title, provides adequate protection of the interest of a holder of

a claim secured by a lien on property of the debtor and if, notwithstanding such protection, such creditor has a claim allowable under subsection (a)(1) of this section arising from the stay of action against such property under section 362 of this title, from the use, sale, or lease of such property under section 363 of this title, or from the granting of a lien under section 364(d) of this title, then such creditor's claim under such subsection shall have priority over every other claim under such subsection.

(c) For the purpose of subsection (a) of this section, a claim of a governmental unit arising from an erroneous refund or credit of a tax shall be treated the same as a claim for the tax to which such refund or credit relates.

(d) An entity that is subrogated to the rights of a holder of a claim of a kind specified in subsection (a)(3), (a)(4), (a)(5), or (a)(6) of this section is not subrogated to the right of the holder of such claim to priority under such subsection.

BANKRUPTCY REFORM ACT OF 1978
11 USC 523

§523. Exceptions to discharge.

(a) A discharge under section 727, 1141, or 1328(b) of this title does not discharge an individual debtor from any debt—

(1) for a tax or a customs duty—

(A) of the kind and for the periods specified in section 507(a)(2) or 507(a)(6) of this title, whether or not a claim for such tax was filed or allowed;

* * *

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity;

(7) to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than a tax penalty—

(A) relating to a tax of a kind not specified in paragraph (1) of this subsection; or

(B) imposed with respect to a transaction or event that occurred before three years before the date of the filing of the petition;

* * *

BANKRUPTCY REFORM ACT OF 1978
11 USC 727

§727. Discharge

(a) The court shall grant the debtor a discharge, unless—

(1) the debtor is not an individual;

(2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed—

(A) property of the debtor, within one year before the date of the filing of the petition; or

(B) property of the estate, after the date of the filing of the petition;

(3) the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case;

(4) the debtor knowingly and fraudulently, in or in connection with the case—

(A) made a false oath or account;

(B) presented or used a false claim;

(C) gave, offered, received, or attempted to obtain money, property, or advantage, or a promise of money, property, or advantage, for acting or forbearing to act; or

(D) withheld from an officer of the estate entitled to possession under this title, any recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs;

(5) the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities;

(6) the debtor has refused, in the case—

(A) to obey any lawful order of the court, other than an order to respond to a material question or to testify;

(B) on the ground of privilege against self-incrimination, to respond to a material question approved by the court or to testify, after the debtor has been granted immunity with respect to the matter concerning which such privilege was invoked; or

(C) on a ground other than the property[1] invoked privilege against self-incrimination, to respond to a material question approved by the court or to testify;

(7) the debtor has committed any act specified in paragraph (2), (3), (4), (5), or (6) of this subsection, on or within one year before the date of the filing of the petition, or during the case, in connection with another case concerning an insider;

(8) the debtor has been granted a discharge under this section, under section 1141 of this title, or under section 14, 371 or 476 of the Bankruptcy Act, in a case commenced within six years before the date of the filing of the petition;

(9) the debtor has been granted a discharge under section 1328 of this title, or under section 660 or 661 of the Bankruptcy Act, in a case commenced within six years before the date of the filing of the petition, unless payments under the plan in such case totaled at least—

Pub. L. 95-598, Nov. 6, 1978, 92 Stat. 2609

[1]So in original. Probably should read "property".

(A) 100 percent of the allowed unsecured claims in such case; or

(B)(i) 70 percent of such claims; and

(ii) the plan was proposed by the debtor in good faith, and was the debtor's best effort; or

(10) the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter.

(b) Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter, and any liability on a claim that is determined under section 502 of this title as if such claim had arisen before the commencement of the case, whether or not a proof of claim based on any such debt or liability is filed under section 501 of this title, and whether or not a claim based on any such debt or liability is allowed under section 502 of this title.

(c)(1) The trustee or a creditor may object to discharge under subsection (a) of this section.

(2) On request of a party in interest, the court may order the trustee to examine the acts and conduct of the debtor to determine whether a ground exists for denial of discharge.

(d) On request of the trustee or a creditor, and after notice and a hearing, the court shall revoke a discharge granted under subsection (a) of this section if—

(1) such discharge was obtained through the fraud of the debtor, and the requesting party did not know of such fraud until after the granting of such discharge;

(2) the debtor acquired property that is property of the estate, or became entitled to acquire property that would be property of the estate, and knowingly and fraudulently failed to report the acquisition of, or

entitlement to, such property, or to deliver or surrender such property to the trustee; or

(3) the debtor committed an act specified in subsection (a)(6) of this section.

(e) The trustee or a creditor may request a revocation of a discharge—

(1) under subsection (d)(1) of this section, within one year after such discharge was granted; or

(2) under subsection (d)(2) or (d)(3) of this section, before the later of—

(A) one year after the granting of such discharge; and

(B) the date the case is closed.

Public Law 95-87, Aug. 3, 1977
30 USC §1232

§1232. Reclamation fee

(a) Payment; rate

All operators of coal mining operations subject to the provisions of this chapter shall pay to the Secretary of the Interior, for deposit in the fund, a reclamation fee of 35 cents per ton of coal produced by surface coal mining and 15 cents per ton of coal produced by underground mining or 10 per centum of the value of the coal at the mine, as determined by the Secretary, whichever is less, except that the reclamation fee for lignite coal shall be at a rate of 2 per centum of the value of the coal at the mine, or 10 cents per ton, whichever is less.

(b) Due date

Such fee shall be paid no later than thirty days after the end of each calendar quarter beginning with the first calendar quarter occurring after August 3, 1977, and ending fifteen years after August 3, 1977, unless extended by an Act of Congress.

(c) Submission of statement

Together with such reclamation fee, all operators of coal mine operations shall submit a statement of the amount of coal produced during the calendar quarter, the method of coal removal and the type of coal, the accuracy of which shall be sworn to by the operator and notarized.

(d) Penalty

Any person, corporate officer, agent or director, on behalf of a coal mine operator, who knowingly makes any false statement, representation or certification, or knowingly fails to make any statement, representation or certification required in this section shall, upon conviction, be purnished by a fine of

not more than $10,000, or by imprisonment for not more than one year, or both.

(e) Civil action to recover fee

Any portion of the reclamation fee not properly or promptly paid pursuant to this section shall be recoverable, with statutory interest, from coal mine operators, in any court of competent jurisdiction in any action at law to compel payment of debts.

(f) Cooperation from other agencies

All Federal and State agencies shall fully cooperate with the Secretary of the Interior in the enforcement of this section.

(g) Allocation of funds

(1) The geographic allocation of expenditures from the fund shall reflect both the area from which the revenue was derived as well as the national program needs for the funds.

(2) Fifty per centum of the funds collected annually in any State or Indian reservation shall be allocated to that State or Indian reservation by the Secretary pursuant to any approved abandoned mine reclamation program to accomplish the purposes of this subchapter. Where the Governor of a State or the head of a governing body of a tribe certifies that (i) objectives of the fund set forth in sections 1233 and 1239 of this title have been achieved, (ii) there is a need for construction of specific public facilities in communities impacted by coal development, (iii) impact funds which may be available under provisions of the Federal Mineral Leasing Act of 1920, as amended [30 U.S.C.A. §181 et seq.], or the Act of October 20, 1976, Public Law 94-565 (90 Stat. 2662) [31 U.S.C.A. §1601 et seq.], are inadequate for such construction, and (iv) the Secretary concurs in such certification, then the Secretary may continue to allocate all or part of the 50 per centum share to that State or tribe for such construction: *Provided, however,*

That if funds under this subparagraph (2) have not been expended within three years after their allocation, they shall be available for expenditure in any eligible area as determined by the Secretary.

(3) The balance of funds collected on an annual basis may be expended in any State at the discretion of the Secretary in order to meet the purposes of this subchapter. Such funds may be expended directly by the Secretary or by making additional grants to approved State reclamation programs pursuant to section 1235 of this title when the Secretary finds that such programs are the best means of accomplishing the specific reclamation projects. The Secretary shall consult and coordinate with the respective States those projects funded directly or in conjunction with other Federal agencies.

OHIO REVISED CODE
History: 136 v. H191 (Eff. 10-10-75)

§1513.08. Operator's surety bond.

(A) The surety bond referred to in division (A) of section 1513.07 of the Revised Code, relating to original applications, shall be upon such form as the chief of the division of reclamation prescribes and provides, and shall be signed by the operator as principal, and by a surety company authorized to transact business in the state as surety. Such bond shall be payable to the state and shall be conditioned upon the faithful performance by the operator of all things to be done and performed by him as provided in section 1513.16 of the Revised Code, or rules or orders of the chief adopted or issued pursuant to that section. The bond shall be for the payment of an amount of money equal to the estimated cost to the state to perform reclamation required by section 1513.16 of the Revised Code in case of default by the operator. No such surety bond shall be for the payment of an amount of money less than five thousand dollars. The amount of the bond shall be determined by order of the chief. Such order may be appealed, either in whole or in part, by the operator. The operator may deposit with the chief, in lieu of surety bond, cash in an amount equal to the surety bond as prescribed in this division of this section, or negotiable certificates of deposit issued by any bank organized or transacting business in this state or certificates of deposit issued by any building and loan association as defined in section 1151.01 of the Revised Code having a cash value equal to or greater than the amount of the surety bond as prescribed in this division of this section. Cash or certificates of deposit shall be deposited upon the same terms as the terms upon which surety bonds may be deposited. If one or more certificates of deposit are deposited with the chief in lieu of surety bond, he shall require the bank or building and loan association which issued any such certificate to pledge

securities of a cash value equal to the amount of the certificate, or certificates, which is in excess of the amount insured by any of the agencies and instrumentalities created by or under the following acts and amendments thereto:

(1) Federal Deposit Insurance Corporation, 64 Stat. 873, 12 U.S.C. 1811;

(2) Federal Savings and Loan Insurance Corporation, 48 Stat. 1256, 12 U.S.C. 1726;

(3) Deposit guaranty association, sections 1151.80 to 1151.92 of the Revised Code. Such securities shall be security for the repayment of the certificate of deposit.

Immediately upon a deposit of cash or certificates with the chief, he shall deliver it to the treasurer of state who shall hold it in trust for the purposes for which it has been deposited. The treasurer of state shall be responsible for the safekeeping of such deposits. An operator making a deposit of cash or certificates of deposit may withdraw and receive from the treasurer of state, on the written order of the chief, all or any part of the cash or certificates in the possession of the treasurer of state, upon depositing with the treasurer of state cash or negotiable certificates of deposit issued by any bank organized or transacting business in this state or certificates of deposit issued by any building and loan association equal in value to the value of the cash or certificates withdrawn. An operator may demand and receive from the treasurer of state all interest or other income from any certificates as it becomes due. If certificates deposited with and in the possession of the treasurer of state mature or are called for payment by the issuer thereof, the treasurer of state, at the request of the operator who deposited them, shall convert the proceeds of the redemption or payment of the certificates into such other negotiable certificates of deposit issued by any bank organzied or transacting business in this state, or such other certificates

of deposits issued by any building and loan association, or cash, as may be designated by the operator.

(B) The surety bond referred to in division (F) of section 1513.07 of the Revised Code relating to amendments to a permit shall be upon such form as the chief of the division of reclamation prescribes and provides, and shall be signed by the operator as principal and by a surety company authorized to transact business in the state as surety. Such bond shall be payable to the state and shall be conditioned upon the faithful performance by the operator of all things to be done and performed by him as provided in section 1513.16 of the Revised Code or rules or orders of the chief adopted or issued pursuant to that section. The bond shall be for the payment of an amount of money equal to the estimated cost to the state to perform reclamation required by section 1513.16 of the Revised Code, in case of default by the operator. The amount of the bond shall be determined by order of the chief. Such order may be appealed, either in whole or in part, by the operator.

The operator may deposit with the chief in lieu of surety bond, cash in an amount equal to the surety bond as prescribed in this division of this section, or negotiable certificates of deposit issued by any bank organized or transacting business in this state, or certificates of deposit issued by any building and loan association having a cash value equal to or greater than the amount of such surety bond. Cash or certificates deposited shall be deposited upon the same terms as the terms upon which such surety bonds may be deposited. Cash or certificates deposited with the chief shall be delivered by him to the treasurer of state, and the treasurer of state shall hold such cash and certificates and make disposition thereof in accordance with the provisions contained in division (A) of this section pertaining to cash or certificates delivered to the treasurer of state as therein provided.

OHIO REVISED CODE
History: 138 v. H1051, (Eff 4-9-81)

1513.08. Bonds.

Sec. 1513.08. (A) After a coal mining and reclamation permit application has been approved but before the permit is issued, the applicant shall file with the Chief of the Division of Reclamation, on a form prescribed and furnished by the chief, a bond for performance payable, as appropriate, to the state and conditional upon faithful performance of all the requirements of this chapter and the permit. The bond shall cover that area of land within the permit area upon which the operator will initiate and conduct coal mining and reclamation operations within the initial term of the permit. As succeeding increments of coal mining and reclamation operations are to be initiated and conducted within the permit area, the permittee shall file with the chief an additional bond or bonds to cover the increments in accordance with this section. The amount of the bond shall be two thousand five hundred dollars per acre or portion thereof. The minimum amount of bond furnished shall be ten thousand dollars. In the event of forfeiture of a bond, and the bond is insufficient to complete the reclamation the chief shall complete the reclamation in accordance with section 1513.18 of the revised code using funds from the reclamation special account.

There is hereby created the Reclamation Special Account in the State Special Revenue Fund to be used by the Chief of the Division of Reclamation to reclaim permit areas upon which any bond has been forfeited before or after the effective date of this section in accordance with section 1513.18 of the Revised Code. Initially, the Special Account shall consist of moneys transferred to it from the unreclaimed lands special account created in section 1513.30 of the revised code. Thereafter, as funds are spent from the reclamation special account, the auditor of state, upon the certification of the chief, shall

transfer such additional funds from the unreclaimed lands special account to keep the balance of the reclamation special account at two million dollars; however, after the initial funding of the special account, the auditor of state shall not transfer more than five hundred thousand dollars to the reclamation special account during any fiscal year.

(B) Liability under the bond shall be for the duration of the coal mining and reclamation operation and for a period coincident with operator's responsibility for revegetation requirements in section 1513.16 of the revised code. The bond shall be executed by the operator and a corporate surety licensed to do business in this state, except that the operator may elect to deposit cash, negotiable bonds of the United States or this state, or negotiable certificates of deposit of any bank or savings and loans organized or transacting business in the United States. The cash deposit or market value of the securities shall be equal to or greater than the amount of the bond required for the bonded area.

(C) The chief may accept the bond of the applicant itself without separate surety when the applicant demonstrates to the satisfaction of the chief the existence of a suitable agent to receive service of process and a history of financial solvency and continuous operation sufficient for authorization to self-insure or bond the amount.

(D) Cash or securities so deposited shall be deposited upon the same terms as the terms upon which surety bonds may be deposited. The securities shall be security for the repayment of such negotiable certificate of deposit.

(E) The amount of the bond or deposit required and the terms of each acceptance of the applicant's bond shall be adjusted by the chief from time to time as affected land acreages are increased or decreased.

OHIO REVISED CODE
History: 135 v. H204 (Eff. 7-30-79)

§5749.02. Mineral severance tax.

For the purpose of providing revenue with which to meet the environmental management needs of this state and the reclamation of land affected in mining, an excise tax is hereby levied on the privilege of engaging in the severance of natural resources from the soil or water of this state. Such tax shall be imposed upon the severer and shall be:

(A) Four cents per ton of coal;

(B) Four cents per ton of salt;

(C) One cent per ton of limestone or dolomite;

(D) One cent per ton of sand and gravel;

(E) Three cents per barrel of oil;

(F) One cent per thousand cubic feet of natural gas.

Seventy-five per cent of the moneys received by the treasurer of state from the tax levied in this section shall be credited to the unreclaimed lands special account created in section 1513.30 of the Revised Code, and twenty-five per cent shall be credited to the oil and gas well plugging special account created in section 1509.071 [1509.07.1] of the Revised Code.

On the day fixed for the payment of the severance tax required to be paid by this section, such tax, with any penalties or interest thereon, shall become a lien on all property of the taxpayer in this state, whether such property is employed by the taxpayer in the prosecution of its business or is in the hands of an assignee, trustee, or receiver for the benefit of creditors or stockholders. Such lien shall continue until such taxes, together with any penalties or interest thereon, are paid.

Upon failure of such taxpayer to pay such tax on the day fixed for payment, the tax commissioner may file, for which no

filing fee shall be charged, in the office of the county recorder in each county in this state in which the taxpayer owns or has a beneficial interest in real estate, notice of such lien containing a brief description of such real estate. Such lien shall not be valid as against any mortgagee, purchaser, or judgment creditor whose rights have attached prior to the time such notice is filed in the county in which the real estate which is the subject of such mortgage, purchase, or judgment lien is located. Such notice shall be recorded in a book kept by the recorder called the "severance tax lien record" and indexed under the name of the taxpayer charged with such tax. When the tax, together with any penalties or interest thereon, has been paid, the tax commissioner shall furnish to the taxpayer an acknowledgement of such payment, which the taxpayer may record with the recorder of each county in which notice of the lien has been filed.

OHIO REVISED CODE
History: 138 v. H1051 (Eff. 4-9-81)

5749.02. Mineral severance tax

Sec. 5749.02. (A) For the purpose of providing revenue with which to meet the environmental management needs of this state and the reclamation of land affected by mining, an excise tax is hereby levied on the privilege of engaging in the severance of natural resources from the soil or water of this state. Such tax shall be imposed upon the severer and shall be:

(1) Four cents per ton of coal:

(2) Four cents per ton of salt:

(3) One cent per ton of limestone or dolomite;

(4) One cent per ton of sand and gravel;

(5) Three cents per barrel of oil;

(6) One cent per thousand cubic feet of natural gas.

Seventy-five per cent of the moneys received by the treasurer of state from the tax levied in this division shall be credited to the unreclaimed lands special account created in section 1513.30 of the Revised Code, and twenty-five per cent shall be credited to the oil and gas well plugging special account created in section 1509.071 of the Revised Code.

(B) For the purpose of paying the state's expenses for reclaiming coal mined lands that the operator failed to reclaim in accordance with chapter 1513 of the revised code on or after the effective date of this division for which the operator's bond is not sufficient to pay the state's expense for reclamation, there is hereby levied an excise tax on the privilege of engaging in the severance of coal from the soil or water of this state in addition to the tax levied by division (A)(1) of this section. The tax shall be imposed at the rate of one cent per ton of coal as prescribed in this division. Moneys received by the treasurer of state from the tax levied under this division shall be credited

to the reclamation special account created in section 1513.08 of the revised code.

After initial funding of the Reclamation Special Account, as provided in section 1513.08 of the revised code, the tax levied by this section shall be imposed when, during any fiscal year, the balance of the reclamation special account is reduced below two million dollars and five hundred thousand dollars have been transferred to the reclamation special account from the unreclaimed lands special account created in section 1513.30 of the revised code during the fiscal year. The tax shall be imposed in the calendar year following the close of the fiscal year during which the balance is so reduced and shall continue to be imposed until the end of the calendar year in which the balance of the reclamation special account is restored to two million dollars, at which time the imposition of the tax shall be suspended until the time that the circumstances requiring the tax to be imposed recur.

When at the close of the fiscal year, the chief of the division of reclamation finds that the balance of the reclamation special account is below two million dollars and that five hundred thousand dollars have been transferred to the special account previously in the fiscal year, the chief shall, within thirty days after the close of the fiscal year, certify that fact to the tax commissioner, at which time the circumstances requiring the imposition of the tax shall be deemed to have occurred.

(C) On the day fixed for the payament of the severance taxes required to be paid by this section, the taxes with any penalties or interest thereon; shall become a lien on all property of the taxpayer in this state; whether such property is employed by the taxpayer in the prosecution of its business or is in the hands of an assignee, trustee, or receiver for the benefit of creditors or stockholders. The lien shall continue until the taxes and any penalties or interest thereon, are paid.

Upon failure of the taxpayer to pay a tax on the day fixed for payment, the tax commissioner may file, for which no filing fee shall be charged, in the office of the county recorder in each county in this state in which the taxpayer owns or has a beneficial interest in real estate, notice of the lien containing a brief description of the real estate. the lien shall not be valid as against any mortgagee, purchaser, or judgment creditor whose rights have attached prior to the time the notice is filed in the county in which the real estate that is the subject of such mortgage, purchase, or judgment lien is located. The notice shall be recorded in a book kept by the recorder called the "severance tax lien record" and indexed under the name of the taxpayer charged with the tax. When the tax has been paid, the tax commissioner shall furnish to the taxpayer an acknowledgement of payment, which the taxpayer may record with the recorder of each county in which notice of the lien has been filed.

CERTIFICATE OF SERVICE

I certify that three copies of this Brief in Opposition to Petition for Writ of Certiorari were mailed pursuant to Supreme Court Rule 28.3 by United States mail, first class, postage prepaid this __ day of May, 1986 to E. Dennis Muchnicki, State Office Tower, 30 East Broad Street, 17th Floor, Columbus, Ohio 43266-0410.

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